The first hurdle against the Director General desirous of having the caveat remaining on the register proved to be insurmountable for no interest of the kind has been created by the new para (ba).

Assuming for the sake of argument that the arrears of income tax did create an interest in land (though there is nothing of the kind) such interest in any event would have to give way to the prior interest of the registered chargee in this case. The registered charge created an indefeasible title against all the subsequent holders of interests in the said lands except for a few exceptions set out under s 340 of the Code which did not apply to the instant case: please see *Bank Bumiputra Malaysia* v *Mahmud bin Mohd Din (Datin Hajjah Salma bte Md Jamin, Intervener)*.[3]

In this connection, learned senior federal counsel's submission that s 340 of the Code should be overridden by the new para (ba), the latter being the later enactment, to make sense, could depend only on the premises which did not exist, ie the premise that para (ba) had created some interest in land not only recognized by the Code, but also expressly or by some irresistible implication provided by it to override all interests in the land, whether prior or subsequent ones. The new paragraph could never aspire to achieve such strange result; if it could, it would indeed be mind-boggling to think that the principle of indefeasibility of title as enshrined in s 340 of the Code, forming the main pillar of the Torrens System, would be swept away thereby for the purpose of s 320 of the Code.

In the absence of the said premise, I could find no conflict between s 340 and the new para (ba) of s 320 of the Code such that the new paragraph, being a later enactment, prevailed over the s 340.

It would seem idle if I am to give further views by assuming the creation of some nondescript interest in land by the new para (ba).

I therefore granted an order in terms of the motion, ie ordering the removal of the registrar's caveat in question, etc. I further ordered the second defendant (the Director General) to pay costs but made no order of costs against the first defendant (the registrar).

Application allowed.

Solicitors: *Kean Chye & Sivalingam.*

Reported by *PS Ranjan*

Pendakwa Raya v Fraser & Neave (M) Sdn Bhd

HIGH COURT (SHAH ALAM) — ULANGBICARA JENAYAH BIL 51-230-87
SHANKAR J
29 DECEMBER 1989

Criminal Law — Strict liability — Sale of bottled drink containing spurious matter — Whether offence is one of strict liability — Defence that all reasonable steps taken to ensure sale of article would not constitute offence — Sale of Food and Drugs Ordinance 1952, ss 11(1)(g), (4), 17 & 21

Evidence — Onus of proof — Whether offence is one of strict liability — Defence that all reasonable steps taken to ensure sale of article would not constitute offence — Balance of probabilities — Sale of Food and Drugs Ordinance 1952, ss 11(1)(g), (4), 17 & 21

Mrs S bought two crates of aerated water from a convenience store in Petaling Jaya. They were labelled with the defendant's labels. A few days later Mrs S noticed some foreign matter in the bottle as she was about to open it and she took it to the MPPJ and made a report to the health inspector. It was found that the matter was a cluster of dead ants covered with saprophytic fungal growth inside the bottle. The lip of the bottle was also found to be slightly chipped. There was no fizz when the bottle was opened.

The retail shop did not buy from the defendant but bought it from a third party who was not called to give evidence. The defendant relied on a system they had which showed that it was not possible for a chipped bottle or the most tenacious colony of ants to survive the process they had. The magistrate was satisfied that reasonable steps had been taken to prevent an offence and acquitted the defendant. The prosecution appealed.

Held, dismissing the prosecution's appeal:

(1) Section 11(1)(g) of the Sale of Food and Drugs Ordinance 1952 ('the Ordinance') has some similarity in wording to s 3(1) of the English Food and Drugs Act 1938 ('the Act') but s 4(1)(4) of the Act which provides a defence in the UK and s 21 of the Ordinance are very differently worded. The English offence was one of strict liability because that is the effect of the words in the English statute. Extraneous matter in food does not create criminal liability in the UK only if its presence is an unavoidable consequence of the process of collection or preparation. Section 21 of the Ordinance states that whilst it is no defence that the defendant did not act wilfully, it is a defence if he can prove that he took all reasonable steps to ascertain that the sale of the article would not constitute an offence against the Ordinance.

(2) Section 11(1) of the Ordinance creates an offence against any person who sells the article. There was no evidence that F & N had sold this bottle of soda. Besides to charge a person with manufacturing and selling in the same charge would appear to make for duplicity.

(3) As the number of manufacturers of spurious goods have significantly increased in the past 28 years, a bottle may be genuine but its contents may not have originated from the manufacturer's factory. Consequently in such cases it makes sense to investigate the whole line of people involved in the selling of the spurious article and charge them unless they can show that what they sold was something which had originated from the manufacturer. There was however no evidence in this case to show that it originated from the manufacturer.

(4) As there are gaps in the prosecution's evidence which leaves the defendant in a position where it could only do its best to show all reasonable steps were taken to ascertain that the sale of the bottle would not constitute an offence under the Ordinance, that onus, on the balance of probabilities, has been easily discharged.

[Bahasa Malaysia summary

Puan S membeli two peti minuman gas asid karbonik daripada sebuah stor kemudahan di Petaling Jaya. Mereka telah dilekat dengan pelekat defendan. Beberapa hari kemudian Puan S ternampak benda asing dalam sebotol minuman itu ketika dia hendak membukanya, dan membawanya ke MPPJ, lalu membuat repot kepada Inspektor Kesihatan. Adalah didapati bahawa benda tersebut merupakan sekumpulan semut-semut mati yang telah ditutupi oleh tumbuhan 'fungal saprophytic' di dalam botol itu. Bibir botol juga didapati merepeh sedikit. Juga tidak ada desir ketika botol itu dibuka.

Kedai runcit itu tidak membelinya daripada defendan tetapi daripada pihak ketiga yang tidak dipanggil untuk memberi keterangan. Defendan bergantung kepada suatu sistem kepunyaan mereka yang menunjukkan bahawa adalah tidak mungkin sesuatu botol yang telah merepeh atau kumpulan semut yang melekat dengan teguh sekali boleh terus wujud di bawah proses mereka itu. Mejistret berpuashati bahawa tindakan munasabah telah diambil untuk mengelakkan kesalahan berlaku lalu membebaskan defendan. Pihak pendakwa raya merayu.

Diputuskan, menolak rayuan:

(1) Seksyen 11(1)(g) Ordinan Penjualan Makanan dan Ubat 1952 ('Ordinan itu') mempunyai sedikit persamaan dari segi perkataannya dengan s 3(1) Akta Makanan dan Ubat Inggeris 1938 ('Akta itu') tetapi s 4(1)(4) Akta itu yang memperuntukkan suatu pembelaan di UK dan s 21 Ordinan itu sangatlah dibezakan dari segi perkataannya. Kesalahan Inggeris adalah sesuatu di bawah liabiliti ketat, kerana itulah kesan perkataan-perkataan dalam statut Inggeris. Benda yang asing daripada makanan tidak mengwujudkan liabiliti jenayah di UK hanya jika kewujudannya itu adalah merupakan kesan yang tidak boleh dielak daripada proses penggumpulan dan penyediaannya. Seksyen 21 Ordinan itu memperuntukkan bahawa walaupun adalah tidak menjadi pembelaan jika defendan tidak bertindak dengan niat jahat, namun begitu, adalah suatu pembelaan jikalau dia boleh membuktikan bahawa dia telah mengambil segala tindakan munasabah bagi memastikan bahawa penjualan benda itu tidak melanggar Ordinan itu.

(2) Seksyen 11(1) Ordinan itu mengwujudkan suatu kesalahan terhadap sesiapa yang menjual benda itu. Di sini, tidak terdapat keterangan bahawa F & N telah menjual botol soda ini. Lagipun, menuduh seseorang dengan kesalahan mengeluar dan menjual dalam satu tuduhan yang sama nampaknya telah menjadi kependuaan.

(3) Oleh kerana bilangan pengeluar barangan palsu telah bertambah dengan ketara dalam tempoh 28 tahun kebelakangan ini, sesuatu botol mungkinnya asli tetapi kandungannya mungkin tidak berasal daripada kilang pengeluar. Oleh demikian, dalam kes-kes sedemikian, membawa erti juga jika menyiasat keseluruhan barisan orang yang terbabit dalam menjual benda palsu itu dan menuduh mereka melainkan jika mereka boleh menunjukkan bahawa apa yang dijual oleh mereka itu adalah berasal daripada pengeluar. Dalam kes ini, tidak ada keterangan yang menunjukkan ia berasal daripada pengeluarnya.

(4) Oleh kerana terdapat kekosongan dalam keterangan pihak pendakwa yang meninggalkan defendan dalam kedudukan di mana dia hanya boleh sebaik-baiknya menunjukkan bahawa segala tindakan munasabah telah diambil bagi menentukan bahawa penjualan botol itu tidak menjadi suatu kesalahan di bawah Ordinan itu, beban tersebut, atas imbangan kebarangkalian telah dengan mudahnya dilepaskan.]

Cases referred to

1 *Lindley* v *George W Horner & Co Ltd* [1950] 1 All ER 234 (refd)

2 *PP* v *Pengurus, Rich Food Products Sdn Bhd* [1982] 1 MLJ 302 (folld)

Legislation referred to

Sale of Food and Drugs Ordinance 1952 ss 11(1)(g), (4), 17, 21

Food and Drugs Act 1938 [UK] ss 3(1), 4(1)(4)

Ibrahim Taib for the appellant.
Porres Royan for the respondent.

Cur Adv Vult

Shankar J: This is an appeal against the acquittal of Fraser & Neave (M) Sdn Bhd ('F & N') for an offence under the Sale of Food and Drugs Ordinance 1952 ('the Ordinance').

On 27 June 1985, Mrs DM Scott bought two crates of aerated water from Cheong Huat (Convenience Store) in Petaling Jaya. The soft drinks in question were contained in 48 bottles out of which 24 were labelled F & N. Some of the bottles labelled F & N contained soda water. Mrs Scott put a selection of soft drinks into her fridge after she got home. On 1 July 1985, she took out a soda water bottle from her fridge. As she was about to open it, she noticed it contained some foreign matter. On closer examination she thought they were dead ants. She took the bottle to the MPPJ the next day and made a report to the health inspector. On 3 July 1985, he submitted the bottle and contents to the government chemist, who found a cluster of dead ants covered with saprophytic fungal growth inside the bottle. He also found the lip of the bottle to be slightly chipped. The cap was flat and undented. He had opened it with a usual opener and found no fizz. So no tests were done to establish its carbon dioxide content. Mrs Scott and her retailer were both recalled for further cross-examination before the close of the prosecution's case. Further evidence was then adduced that Mrs Scott had applied some pressure in attempting to open the bottle; but had not actually got to taking the cap off. On seeing the dead ants she stopped, leaving the cap on. Immediately she examined the other bottles in her possession. These were not contaminated. Mrs Scott's retail shop proprietor had not bought her supply from F & N at all but from somebody called Ban Yoon who was not called to give evidence. Consequently there was no direct evidence at the close of the prosecution's case if this particular bottle of soda water had in fact been manufactured by F & N, and if so when, and if in fact it had been sold by them to Ban Yoon. The only material evidence therefore was that the bottle had an F & N label.

After hearing a submission of no case the learned magistrate called for the defence, on the charge, which was that in contravention of s 11(1)(g) of the Ordinance, F & N had at Cheong Huat's retail store, on 27 June 1985 manufactured and sold food to the prejudice of Mrs Scott, to wit, a bottle of soda water which was not of the nature of food demanded by the purchaser and thereby committed an offence under s 11(4) of the Ordinance.

The defendants relied on system. F & N bought new bottles from KL Glass Bhd. They also used 'empties' from the open market. These were first visually inspected for suitability. Then they were fed on slab conveyors into a mechanical washer which cleaned out the bottles in a nine-stage operation. The bottles were pre-rinsed with water, pre-heated, repeatedly soaked under high pressure with a hot caustic solution and then repeatedly rinsed out again under hot and cold water.

Then the bottles were both visually and electronically inspected for damage before the contents were filled in and the bottles capped and stacked for delivery to the open market.

The production manager of F & N gave evidence to this effect after the learned magistrate had visited the factory.

The production manager said that a chipped bottle of the kind tendered in evidence would not have passed their inspection processes. It was evident that the most tenacious colony of ants would not have survived the kind of washing processes to which F & N subjected their bottles.

The magistrate was satisfied that s 21 of the Ordinance applied, ie that all reasonable steps had been taken to prevent an offence.

In this appeal, the learned DPP relied on *Lindley* v *George W Horner & Co Ltd.*[1] He submitted that the offence was one of strict liability, and the magistrate should therefore have convicted.

With respect, it should first of all be noted that although s 11(1)(g) of our Ordinance has some similarity in wording to s 3(1) of the English Food and Drugs Act 1938 ('the Act'), s 4(1)(4) of the Act which provides a defence in the UK and s 21 of our Ordinance are very differently worded. Lord Goddard CJ held in *Lindley*'s case[1] that the English offence was one of strict liability because that is the effect of the words of the English statute. Extraneous matter in food does not create criminal liability in the UK only if its presence is an unavoidable consequence of the process of collection or preparation.

Under our law, s 21 specifically states that whilst it is no defence that the defendant did not act wilfully it is a defence if he also proves that he took all reasonable steps to ascertain that the sale of the article would not constitute an offence against the Ordinance.

In the present case, the learned magistrate held that the burden on the defence had been discharged. Besides, as Mr Porres Royan has pointed out, there is Malaysian case law that ours is not a strict liability offence: see *PP* v *Pengurus, Rich Food Products Sdn Bhd.*[2]

With respect to counsel for both parties there are some other aspects of this case which calls for comment.

The charge averred that there was a contravention of s 11(1)(g) of the Ordinance in that F & N 'did manufacture *and* sell food ...'. But s 11(1) of the Ordinance only creates an offence against any person 'who *sells* ...'. There was absolutely no evidence that F & N had sold this bottle of soda. Besides to charge a person with manufacturing and selling in the same charge would appear to make for duplicity.

Section 17 of the Ordinance provides that 'where food in connection with which there is a breach of any provision of this Ordinance is sold in any unopened package, any person who appears from any statement thereon ... to have manufactured or prepared such food or to have enclosed it in such package shall, unless he proves the contrary, be deemed to have ... manufactured prepared or enclosed ... the same ... and shall be liable to the same penalty as if he had actually sold the same'.

In the 28 years which have gone by, since this law was passed in 1952, the manufacturers of spurious goods have significantly increased. A bottle may be genuine but its contents may not have originated from the manufacturer's factory but in some infringer's backyard. Consequently it seems to me that in such cases it makes sense to investigate the whole line of people involved in the selling of the spurious article and charge them unless they can show that what they sold was something which had originated from the manufacturer.

In the present case, the train of events taken backwards in time was as follows. Cheong Huat sold the bottle of 'soda water' to Mrs Scott on 27 June 1985. But there was no evidence:

(a) when Cheong Huat got it from Ban Yoon;
(b) that Ban Yoon had bought it from F & N, and if so when;
(c) that the bottle had been 'unopened' after it first left F & N's factory;
(d) that F & N had in fact filled this particular bottle with its contents;
(e) what the liquid in the bottle in fact was.

The learned DPP's complaint is that F & N did not prove that the system upon which they relied at the time of the trial was in existence when the bottle was filled. This problem arose because it was not possible to say merely by looking at the bottle or the cap, if and when it left the F & N factory.

Thus s 17 puts the manufacturer in an invidious position because it requires the court to invoke a rebuttable presumption from a mere label on the bottle that it is F & N who put the liquid in the bottle. Although Cheong Fatt sold it, F & N is also deemed from the label to have filled it. So F & N are to be liable to the same penalty, as if F & N had actually sold the bottle unless they rebut the prosecution's case.

Taking an overview of the matter, I hold that the gaps in the prosecution's evidence earlier referred to left F & N in a position where it could only do its best to show that all reasonable steps were taken to ascertain that the sale of the bottle would not constitute an offence against the Ordinance. That onus in law was one to show a defence on the balance of probabilities only. On the facts of this case, it was easily discharged.

I therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Shook Lin & Bok.*

Reported by *Yap Shao Sin*

Boonsom Boonyanit v Adorna Properties Sdn Bhd

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24-554-89
MOHAMED DZAIDDIN J
7 DECEMBER 1989 AND 27 DECEMBER 1989

Land Law — Registrar's caveat — Power of court to order registrar to enter registrar's caveat — Registrar of Titles not a party to proceedings — National Land Code 1965, ss 320(1) & 417(1)

Civil Procedure — Government proceedings — Injunction to restrain Registrar of Titles from registering any instrument of dealing in respect of land in dispute — Jurisdiction of court to make order — Government Proceedings Ordinance 1956, s 29(1) & (2) — Specific Relief Act 1950, s 54(d)

In this application, the respondent asks that the court set aside the order dated 14 July 1989 ('the said order') restraining the Registrar of Titles, Penang from registering any instrument of dealing and directing the entry of the registrar's caveat pursuant to s 320 of the National Land Code 1965 in respect of land situated at Bandar Tanjong Bungah ('the said land'). The order had been granted after considering the supporting affidavit of the applicant's solicitor, who alleged that she received information that someone had impersonated the applicant with forged documents to dispose of the said land. The two issues in this application are (i) whether the ex parte interlocutory mandatory injunction, and the registrar's caveat, was properly made; and (ii) whether in the present circumstances, the registrar's caveat should remain until the final determination of the dispute regarding the said land. A crucial question is whether the registrar's caveat was properly ordered, the Registrar of Titles never being a party to this originating summons.

[Upon the first hearing of the application, the learned judge held that the ex parte injunction order was properly made, as the application was one of great urgency and any further delay in filing the said application would have caused the applicant great hardship, on account of the alleged fraud committed or improper dealing concerning the transfer of the said land to the respondent. The learned judge also held that notwithstanding that the Registrar of Titles is not a party to this application, the court has power to order the registrar to enter the registrar's caveat under s 417(1) of the National Land Code 1965.

On 22 December 1989, the learned judge heard further arguments of counsel under O 56 r 2(2) of the Rules of the High Court 1980, wherein he held that the court has no jurisdiction to order an injunction against the Registrar of Titles, Penang, restraining him from registering any instrument of dealing in respect of the land in dispute in this summons. However, he affirmed his order that the registrar's caveat was necessary in order to prevent fraud or improper dealing.

For completeness, both written decisions of the learned judge are reported here.]

Held, dismissing the respondent's application in part:

(1) The court has no jurisdiction to order an injunction against the Registrar of Titles, Penang restraining him from registering any instrument of dealing in respect of the land in dispute, in view of s 29(2) of the Government Proceedings Ordinance 1956 read with s 54(d) of the Specific Relief Act 1950.

(2) Notwithstanding that the Registrar of Titles is not a party to this application, the court has power under s 417(1) of the Code to order the registrar to enter the registrar's caveat under s 320 to prevent fraud or improper dealing.

(3) Section 417 empowers the court to direct by order the registrar to do all such things as may be necessary to give effect to the court's order or judgment which included ordering the registrar to enter his registrar's caveat under s 320.

[Bahasa Malaysia summary

Dalam permohonan ini, penentang memohon mahkamah mengenepikan perintah bertarikh 14 Julai 1989 ('perintah itu') yang menghalang Pendaftar Hakmilik Tanah Pulau Pinang daripada mendaftar sebarang suratcara urusniaga dan mengarah kaveat pendaftar dimasukkan menurut s 320 Kanun Tanah Negara 1965 terhadap sebidang tanah di Bandar Tanjong Bungah ('tanah itu'). Perintah itu telah diberi setelah menimbang afidavit sokongan peguamcara pemohon yang mengatakan bahawa beliau menerima maklumat bahawa ada seorang telah menyamar dirinya sebagai pemohon dengan dokumen palsu untuk melupuskan tanah itu. Dua isu dalam permohonan ini adalah (i) adakah injunksi mandatori interlokutori dan kaveat pendaftar telah dibuat dengan wajarnya dan (ii) adakah dalam keadaan sedemikian, kaveat pendaftar seharusnya ditinggalkan sebagaimana keadaannya yang dahulu sehingga penyelesaian muktamad pertikaian mengenai tanah itu. Suatu soalan yang genting ialah adakah kaveat pendaftar diarah dengan wajarnya sedangkan Pendaftar Hakmilik Tanah tidak langsung dijadikan pihak dalam saman pemula ini.

[Selepas perbicaraan pertama permohonan ini, yang arif hakim memutuskan bahawa perintah ex parte itu telah dibuat dengan wajarnya kerana permohonan ini adalah sesuatu yang sangat perlu disegerakan dan sebarang kelambatan seterusnya dalam menfailkan permohonan ini boleh membawa kesusahan